No. 923

APR 5 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

HENRY V. McGURREN,

Petitioner,

vs.

GLADYS McVEIGH, in her own proper person and as Guardian of the Persons and Estates of Thomas McConnell and Charles Dewey McConnell, Minors,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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GLADYS McVEIGH, in her own proper person and as Guardian of the Persons and Estates of Thomas McConnell and Charles Dewey McConnell, Minors,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Henry V. McGurren, a resident of the State of Illinois, respectfully shows that on December 27, 1940 (rehearing denied March 3rd, 1941), the United States Circuit Court of Appeals for the Seventh Circuit affirmed a judgment entered by the District Court of the United States for the Northern District of Illinois upon a jury verdict rendered after a trial before the Honorable Philip L. Sullivan, District Judge, said judgment having been entered on the 7th day of February, 1940, in favor of

Gladys McVeigh in her own proper person (hereinafter referred to as plaintiff-sole), in the sum of $4,000 and in favor of Gladys McVeigh as guardian of the persons and estates of Thomas McConnell and Charles Dewey McConnell, minors (hereinafter referred to as plaintiff-guardian) in the sum of $8,500, being the respondents herein, the court having entered judgment against Henry V. McGurren, Defendant, the Petitioner herein, in the sum of $12,500.

Summary and short statement of the matter involved.

This action was brought by two plaintiffs, plaintiff-sole and plaintiff-guardian (said plaintiffs being so referred to in the proceedings before the Circuit Court of Appeals), each respectively, to recover special and general damages suffered by plaintiff-sole and by plaintiff-guardian, and each of them, and also to recover punitive damages allegedly occasioned by affirmative, false, and fraudulent representations allegedly made by the Defendant, pursuant to which Plaintiff, Gladys McVeigh, alleges she signed, on March 18, 1935, a document hereinafter designated as RELEASE (Tr. 92), whereby she effectively released all sums due her as plaintiff-sole and also all sums due or that might become due said Thomas McConnell, Jr. and said Charles Dewey McConnell, minors, from their father, Thomas McConnell, pursuant to a property settlement agreement (hereinafter designated as AGREEMENT, Tr. 77, 79) which prior thereto had been incorporated in and approved by a decree of divorce granted plaintiff-sole by a California court, which aforesaid damages she sought to recover for them as their guardian.

Plaintiff alleged that in and by said AGREEMENT (Pltf's Ex. 1, Tr. 77, 79 to 85) said McConnell was to pay plaintiff

individually, $150 a month for her own support until she remarried and was also to pay her the sum of $100 a month for the support of the two children of the parties during their minority, they then being of the ages of six and one-half and four and one-half years respectively;

That the Superior Court of Los Angeles County, California, had entered interlocutory and final judgments of divorce (Pltf's Ex. 1, Tr. 77, 78 and 79) which in substance incorporated said AGREEMENT and approved the same; that there became due to plaintiff-sole, under said AGREEMENT, for her own support and for the support of the two minor children the sum of $16,887.54 plus an obligation of McConnell to pay $8,608.03 for future support of said children; that a few days prior to the execution of said RELEASE the Defendant, as executor of the Estate of John M. Grace, deceased, distributed to said McConnell a large amount of money and property and that shortly after said distribution of said funds by the Defendant to said McConnell the Defendant, intending to fraudulently obtain a release from Plaintiff of the kind and character above set forth, falsely represented to Plaintiff at Los Angeles, California, that said McConnell was without any money, funds, or property with which to meet his obligations to Plaintiff and that he had been able to borrow the sum of $1250 which Defendant was authorized to pay Plaintiff for the signing of the said RELEASE; and that Plaintiff executed said RELEASE, believing the said representations of Defendant and relying on the same; and that after the death of McConnell on June 8, 1936, and the probating of his estate in the Probate Court of Cook County, Illinois, she for the first time learned that McConnell had much of the property that was delivered to him by Defendant

McGurren as executor of the estate of John M. Grace, deceased, at the time that she executed said RELEASE and that said RELEASE was therefore obtained by false and fraudulent representations of Defendant.

Plaintiff further alleged that she filed a claim against the said estate of McConnell (Pltf's Ex. 5, Tr. 152 to 154) in her own behalf and as guardian of the persons and estates of the said minor children, in the sum of $25,000, and that at a hearing thereon in the Probate Court of Cook County the Defendant herein, as attorney for said estate, interposed the said RELEASE of March, 1935, as a defense to said claim, and that said claim was disallowed in said Probate Court (Pltf's Ex. 6, Tr. 156, 157) solely upon the basis of said RELEASE and for no other reason whatsoever (Tr. 19, 20, 30); that Plaintiff was compelled to sue the Estate of McConnell in the Superior Court of Cook County to obtain cancellation of said RELEASE for fraud and to incur expenses in that behalf, demanding special damages of $10,000 and general and punitive damages of $35,000.

Defendant in his Answer to Plaintiff's complaint in this proceeding denied all of the material allegations of the complaint except such allegations as pleaded the record of the divorce proceedings in California and the proceedings in the Probate and Superior Courts of Cook County and the execution of the RELEASE and alleged that the amounts due under the AGREEMENT were payable to the Plaintiff individually and in no other capacity (Tr. 32), and that the AGREEMENT was entered into between the Plaintiff and McConnell in the light of certain statutory provisions of the State of California, as follows (Tr. 33, 34):

> "OBLIGATION OF PARENTS FOR THE SUPPORT AND EDUCATION OF THEIR CHILDREN.—The parent entitled to the custody of a child must give him support and edu-

cation suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability." (Deering's Civil Code of Calif., 1931, Sec. 196, Chap. 3.)

"HUSBAND AND WIFE. PROPERTY RELATIONS.—A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation, and may make provision for the support of either of them and of their children during such separation." (Deering's Civil Code of Calif., Sec. 159, Chap. 3.)

"WHEN A PARENT IS NOT LIABLE FOR SUPPORT FURNISHED HIS CHILD.—A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause." (Deering's Civil Code of Calif., Sec. 208, Chap. 3.)

And further alleged that but for the provisions of said AGREEMENT obligating McConnell to pay to the Plaintiff the sums provided therein, the law would have cast upon the Plaintiff the duty of supporting said two minor children, and that the obligation contained in said AGREEMENT to pay to Plaintiff the sums therein mentioned for the support of said minor children was a single and sole contract of McConnell with the Plaintiff individually; that said two minor children had no right or claim against their father thereunder that they could enforce against him other than the right of support as is provided by Section 196 of the Civil Code of California, and that the provisions of said AGREEMENT were for the sole benefit and protection of the Plaintiff-sole and not for the purpose of creating any right, interest or claim in or for said children against their father. (Tr. 35.) The answer further demanded full proof that McConnell failed to make the payments under the said AGREEMENT. (Tr. 40.)

The Defendant further alleged that the $1250, which was the consideration for the RELEASE, was paid to the Plaintiff-sole, and not paid to her in any representative capacity and not for the purpose of securing a release of any of the rights of the minor children. (Tr. 40.) As to the hearing in the Probate Court, the Defendant alleged that the claim of the Plaintiff was denied after consideration of all of the evidence presented upon the hearing, and that it does not appear from the record of said court that the RELEASE was held as a bar to Plaintiff's claim. (Tr. 70-72.)

Defendant in paragraph 15 of his answer (Tr. 49) further alleged that the decree entered in the above mentioned Superior Court case referred to in Plaintiff's Amended Complaint (Tr. 20), provided, among other things, as follows (Tr. 55):

> "That no false or fraudulent representations were made by the said Henry V. McGurren to the said Gladys McVeigh to secure her release of the sum of Nine Thousand Dollars ($9,000.00) due and owing to her as alimony for her own support and maintenance from March 20, 1928, until April 7, 1933, the date of her remarriage; and that for and in consideration of the sum of One Thousand Two Hundred Fifty Dollars ($1,250.00) she finally and effectively released Thomas F. McConnell from any and all claims which she had for alimony and her individual support and maintenance under and by virtue of the said Decree and Judgment of Divorce and the contract included as part thereof. That it was not necessary to submit the said release to the Superior Court of California for its approval insofar as the same related to her individual support and alimony";

which said paragraph of Defendant's answer was stricken by the trial court (Tr. 68, 70).

Defendant further in his answer denied that Plaintiff filed a claim in the Probate Court of Cook County in the

estate of Thomas McConnell, deceased, in any representative capacity, as guardian or otherwise, for and on behalf of said children (Tr. 42); and denied that Plaintiff's claim filed in her individual capacity in the said Probate Court was disallowed solely by reason of said release being held as a bar thereto (which defense the trial court struck from Defendant's answer on motion of plaintiff (Tr. 63, 70), and thereafter Defendant filed an amended paragraph 13 in which he admitted that Plaintiff filed a claim in the Probate Court in her individual capacity in the sum of $21,674.23 against the Estate of Thomas McConnell, deceased, but denied that she filed any claim in any representative capacity on behalf of said two minor children, as their guardian or otherwise (Tr. 70, 71), and also denied (Par. 2, Tr. 71) that the Probate Court held that the release in question was a bar to Plaintiff's claim set forth in the Amended Complaint filed herein and denied that the defendant, as attorney for the administratrix of the Estate of McConnell, deceased, interposed said alleged RELEASE as a defense in bar to the claim of the plaintiff as set forth in said Amended Complaint (Tr. 71, 72).

Petitioner at this point believes it is desirable to call attention of the Court to the fact that on motion of the Plaintiff certain other paragraphs of Defendant's Answer to Plaintiff's Amended Complaint were stricken, as follows:

Paragraph 13 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant pleaded the defenses raised by the Administratrix of the Estate of McConnell to the allowance of Plaintiff's claim in the Probate Court of Cook County in denial of the implication contained in the allegation of Plaintiff that her claim in the Probate Court was disallowed solely because of the

interposition of the release in question (Tr. 42 to 48), without the presentation of any other objections or defenses.

Paragraph 16 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant pleaded that if said release does in fact release said McConnell from the payment of any alleged amounts due or to become due under said property settlement agreement or judgment of divorce incorporating the same for the support and maintenance of Plaintiff's two minor children, then said alleged amounts became due or would become due pursuant to the incorporation of said property settlement agreement in said judgment of divorce, because said property settlement agreement thereby became merged in said judgment of divorce, which judgment remains unsatisfied, that said release was never submitted for approval to the divorce tribunal which entered said judgment of divorce, and that, as a matter of law and also of fact Gladys McVeigh was without legal capacity or authority or right to execute the release in question (Tr. 56, 57).

Paragraph 17 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant alleged that if any sums became due under said property settlement agreement or under the decree of divorce to Gladys McVeigh as trustee or guardian of her two minor children that said release was contrary to public policy of the States of California and Illinois and was illegal and void *ab initio* and could not be pleaded as a bar to any action of the Plaintiff predicated on either the property settlement agreement or the judgments of divorce in which it was merged (Tr. 57, 58).

Paragraph 18 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant set forth

that there were two children born to Thomas McConnell as a result of a second marriage, one of them being a posthumous child, both of whom were living in and resident of the State of Illinois, that to allow the claim of the wards of Plaintiff-guardian, children of the first marriage, would render the two children of the second marriage, resident of Illinois, penniless and without maintenance, that the agreement which had become merged in the decree of divorce was simply a provision for the maintenance of said children predicated on the usual common law duty of a parent to take care of his children and nothing more, and that to enforce said claim ot plaintiff-guardian's wards for the full amount against the estate of McConnell would be contrary to public policy of the State of Illinois in reference to the administration of the estates of decedents, which recognizes the doctrine of equality of distribution among all the children of a decedent (Tr. 58).

Paragraph 19 of Defendant's Answer was stricken by the Court (Tr. 70). In this paragraph Defendant set forth the decree of the Superior Court of Cook County to the effect that the Court, after considering the issues, found that the minor children of Plaintiff in that suit (being the wards of Plaintiff-guardian herein) were entitled to the sum of $8,000 under the property settlement agreement as incorporated in the decrees of divorce, that the release was invalid as to said minor children as it was not approved by the Superior Court of Los Angeles County, which had jurisdiction of said divorce proceedings, and that said amount of $8,000 should be paid out of the Estate of Thomas McConnell, deceased, in due course of administration (Tr. 59, 60).

We have not attempted to specifically refer to all the divers motions made by the parties in respect to the

pleadings, believing that the reference in our argument to certain parts of said motions will be sufficient without the necessity of burdening the court with a consideration of the same at this time.

We have refrained from attempting to review all of the evidence in this case. However, it does appear that the Plaintiff testified to two conferences, one at the Hollywood Hotel, Los Angeles, which she first said took place on March 13th, changing the date, on cross-examination to March 15th (Tr. 86, 104), and which the defendant says took place on March 13th (Tr. 205), at which only she and the Defendant were present. He denies that he made each and all of the deceitful representations attributed to him. Defendant then testifies that there was a further conference on March 15th at the Prosecutor's office with the Plaintiff, and he is corroborated in his testimony that such conference took place by the witnesses Oakley and Peters (Arlene Evans Peters) (Tr. 258, 282), and Defendant testifies that at that conference he told the Plaintiff that he would have to find out whether or not McConnell would pay more money for a settlement than he was authorized to offer her, and they agreed to meet for a further conference at the Prosecutor's office at a future date (Tr. 209) and did meet on March 18th (Tr. 211). The plaintiff absolutely denied under oath that the conference of March 15th took place (Tr. 125, 126). Both Plaintiff and Defendant testified there was a conference at the Prosecutor's office on March 18th (Tr. 89), at which time the Plaintiff reiterates that the Defendant again made the alleged affirmative, fraudulent, deceitful representations (Tr. 91), and Attorney Ham, who was at that conference to advise her, in part corroborated her testimony (Tr. 136). Defendant denies that he made the alleged

affirmative, fraudulent, deceitful representations attributed to him at the Prosecutor's office (Tr. 215) and the effect of the testimony of the witnesses Oakley and Peters (Arlene Evans Peters) is to corroborate him (Tr. 258, 286). The Release was executed at the conference on March 18th (Tr. 91).

Special damages having been specifically waived by the Plaintiff (Tr. 301), and while the jury were instructed as to punitive damages (Tr. 374), their verdict of $4,000 for plaintiff-sole and $8,500 for plaintiff-guardian clearly was limited to general damages (Tr. 376). The verdict was arrived at upon the following instruction of the court as to general damages (Instruction 20, Tr. 374), and expresses the theory on which Plaintiff's case was tried (Tr. 183-302), and was not challenged by the Defendant.

> "The matter of general damages, without any intention to convey to the jury any facts in issue in this case that the general damage is recoverable in a case of this kind, are the difference between the fair and reasonable value at the *time* and *place* in question of the claim or right *surrendered, cancelled,* or *released,* by the plaintiff under the *terms* of the *release* in evidence, and the amount paid her under the evidence at the time of the execution of such release." (Italics ours.)

Jurisdictional Statement.

The jurisdiction of this court is based upon Section 240 A of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA, Par. 347A), and rule 38 of the Revised Rules adopted February 13, 1939, and this petition is presented within three months of the date of the denial of petition for re-hearing in the United States Circuit Court of Appeals, namely, March 3, 1941.

Questions Presented

(a) The case having been tried and submitted to the jury upon a measure of damages assented to by both the Plaintiff and the Defendant, and adopted by the court in its charge to the jury, can the Circuit Court of Appeals justify the verdict on an entirely different measure of damages upon which the jury were not instructed?

(b) Were the findings and orders of the decree entered in the Superior Court of Cook County, to the effect that this defendant was not guilty of the fraudulent representations attributed to him; that the release in question did not affect the rights of the minors, wards of plaintiff-guardian, under the divorce decrees; and that the said minors and wards were entitled to $8,000 out of the estate of McConnell, deceased, predicated on their rights under the divorce decrees, all properly pleadable and material evidence in this cause?

(c) Can the Circuit Court of Appeals disregard the settled law of the State of Illinois with respect to the statutory proof and evidence required for the allowance of claims against estates of decedents in proceedings in the Probate Court?

(d) Was the ruling of the Court of Appeals to the effect that it is only necessary for a plaintiff in a case of this kind to establish the gravamen of the action by a preponderance of the evidence and that an instruction to that effect was proper rather than by a clear preponderance of the evidence contrary to and in conflict with applicable local decisions and therefore error?

Reasons relied on for writ.

I.

The decision of the Circuit Court of Appeals to the effect that the validity of the release was immaterial amounts to the establishment, as a principle of law, by that Court, that it is not bound, in reviewing the case, by the theory upon which Plaintiff tried her case, which was also assented to by the Defendant, and pursuant to which the Court gave instructions to the jury to the effect that the measure of damages is the difference between the value of what plaintiff received under the release and the value of the thing released, which instruction could be predicated only on the theory that the release was valid and binding upon one or both of the plaintiffs; and in this respect the opinion of the Circuit Court of Appeals in this case is inconsistent with the decision of Circuit Courts of Appeal of other circuits and is also in conflict with applicable local decisions.

II.

The decision of the Circuit Court of Appeals is predicated upon the theory of law that a decision in the State court cannot be pleaded as *res judicata* or estoppel and is not binding upon the plaintiff instituting the proceeding in the State court in another case, unless the party in the second suit making such plea, was a party to said State court suit and unless there was mutuality; thereby making a decision directly contrary to decisions of other Circuit Courts of Appeals that mutuality is not necessary in order that a plea of estoppel or *res judicata* may be effective by reason of the finding of facts in another court in a

prior suit adverse to the plaintiff, even though there was not mutuality and though the party pleading the estoppel or *res judicata* was in no way a party to or in privity with the parties to the other suit.

III.

The opinion of the Circuit Court of Appeals that the findings of fact of the Superior Court of Cook County to the effect that McGurren had not been guilty of the deceitful acts attributed to him in that case (being the same identical acts complained of in this case) could not be pleaded as *res judicata* or estoppel in this case, is contrary to the law of the State of Illinois, which has adhered to the principle that in cases of *respondeat superior,* if it has been found in a prior suit that the actor-agent, whose action it was necessary to find was negligent or tortious in order to hold the principal, was not guilty; or, if in a prior suit against the agent it has been found that the agent was not guilty of the negligent and tortious acts attributed to him which it is necessary to establish and prove to hold the principal in an action against the principal; then and in that case, irrespective of whether the suit was against the principal in the first instances and against the actor-agent in the second instance, or whether it was in the first instance against the actor-agent and in the second instance against the principal, either the principal-defendant or the actor-agent-defendant may plead in a subsequent suit the finding of fact that said actor-agent was not guilty of the tortious acts attributed to him.

IV.

The finding of the Circuit Court of Appeals that there was no error committed by the trial court in striking that portion of defendant's answer which set up that the

plaintiff-guardian had obtained a judgment in the Superior Court of Cook County in favor of her wards, in the sum of $8,000, was tantamount to finding that the defendant could not plead such judgment as an estoppel or *res judicata,* predicated on the theory that the defendant was not a party to said suit and there was no mutuality, and is contrary to the decisions on that point of other Circuit Courts of Appeal.

V.

The decision of the Circuit Court of Appeals was contrary to the clear and fair deductions as to what is the law of the State of Illinois in respect to *res judicata* and estoppel, even though it may not appear that the doctrine of *respondeat superior* was involved, but predicated on the same theory which permits a prior judgment to be pleaded as *res judicata* or estoppel in cases of *respondeat superior,* for each of those cases is predicated on the theory that the principal or agent, who is the tort feasor, must have been found guilty in order to hold the superior or master and that is a principle of law not predicated on the theory of *respondeat superior* or agent and servant necessarily, but on the theory that in a case where a plaintiff has contended that he is entitled to relief predicated on certain definite acts and it has been found that he is not entitled to relief predicated on those acts because the person charged with those acts did not perpetrate the same, then it is an established principle that such adjudication can be pleaded as *res judicata* or estoppel in any other proceedings started by the same plaintiff where, in order to recover, it is necessary to establish that the party to whom said acts were attributed, being the same acts, was guilty of those acts.

VI.

The ruling of the Circuit Court of Appeals disregards the settled law of the State of Illinois with respect to the proof necessary for the allowance of claims against estates of decedents in proceedings in Probate in the State of Illinois and is therefore in conflict with applicable local decisions.

VII.

The ruling of the Circuit Court of Appeals to the effect that it is necessary for the plaintiff, in an action for fraud, to prove all the elements of the fraud by only a mere preponderance of the evidence, rather than by a clear preponderance of the evidence, is contrary to and in conflict with applicable local decisions.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court the transcript of record and all proceedings in said Circuit Court of Appeals in the cause entitled "*Gladys McVeigh, in her own proper person and as Guardian of the persons and estates of Thomas McConnell and Charles Dewey McConnell, Minors, Plaintiff-Appellee* v. *Henry V. McGurren, Defendant-Appellant,* No. 7308", to the end that said cause may be reviewed and determined by this Court as provided by law; and that your Petitioner may have such other and further relief and remedy in the premises as to this Court may seem proper, and that said judgment in said cause may be reversed by this Honorable Court.

HENRY V. MCGURREN,

By CHARLES H. SOELKE,
Counsel for Petitioner.